

RE GERTRUDE KHO LNG THAI; EX P AMFINANCE BHD

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[BANKRUPTCY PROCEEDINGS NO: 29-48-2004-III(II)]
28 DECEMBER 2007

BANKRUPTCY: *Notice - Validity - Interests in bankruptcy notice - Whether time barred - Sarawak Limitation Ordinance - Whether not applicable to bankruptcy proceedings - Sarawak Limitation Ordinance (Cap 49) art. 44*

The bankruptcy notice herein ('BN') was issued pursuant to a judgment debt dated 8 August 1998. The facts showed that in quantifying the interests accruable to the debt, the judgment creditor ('JC') has *inter alia* included in interests from 21 February 2001 to 1 March 2004 ('the impugned interests'). The judgment debtor ('JD'), relying on *Re Lim Szu Ang, Ex P Kewangan Utama Berhad*, argued that the inclusion of the impugned interests was statute barred and in transgression of art. 44 of the Sarawak Limitation Ordinance (Cap 49), since that article provides for a three-year limitation for claims for interests. It was the JD's stand that the BN was on this score unenforceable and bad in law and ought to be set aside. The JC replied that the Sarawak Limitation Ordinance did not apply to bankruptcy proceedings, and in support thereof cited the Court of Appeal case of *Chin Sin Lan v. Delta Finance Bhd*. The learned Senior Assistant Registrar agreed with and adopted the JC's argument, and in the circumstances dismissed the JD's application to set aside. Dissatisfied, the JD appealed.

Held (dismissing the appeal):

- (1) As was said by the Court of Appeal in *Chin Sin Lan* "bankruptcy proceedings are not execution proceedings and do not therefore come within the definition of "suit" as defined by the Sarawak Limitation Ordinance". (para 4)
- (2) The decisions which the learned judge relied on in *Re Lim Szu Ang* concerned the Limitation Act which only applied to West Malaysia. The decision in *Chin Sin Lan*, on the other hand, relates directly to the issue raised in this appeal, namely the applicability of the Sarawak Limitation Ordinance to bankruptcy proceedings. In the circumstances, this court is bound by and must follow that decision. (para 5)
- (3) The argument that it was improper of the JC to have proceeded only against the second defendant JD as the guarantor, and not against the first defendant principal borrower, is without merit. The

A JD's liability is independent of the principal borrower's, and in such circumstance the law is clear and that is that the JC can seek payment of the judgment debt from whomsoever it chose to. (para 7)

B **Case(s) referred to:**
Chin Sin Lan v. Delta Finance Bhd [2004] 3 CLJ 113 CA (*fol*)
Re Lim Szu Ang, Ex P Kewangan Utama Bhd [2005] 7 CLJ 23 HC (*dist*)

Legislation referred to:
Sarawak Limitation Ordinance (Cap 49), s. 44

C *For the appellant/debtor - KC Wong; M/s KC Wong & Assoc*
For the respondent/creditor - Tony Ling Lee Tom; M/s HC Lee & Co Advocates
Reported by Wan Sharif Wan Ahmad

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JUDGMENT

David Wong Dak Wah J:

E [1] This is an appeal against the decision of the Senior Assistant Registrar in dismissing the debtor's application to set aside the judgment creditor's Bankruptcy Notice (BN).

F [2] The BN dated 1 March 2004 was issued based on a judgment debt dated 8 August 1998. In the BN, interests on the judgment debt was claimed from 20 February 1998 to 1 March 2004 which in the view of the debtor's counsel, Mr. KC Wong, contains interests (interests from 21 February 2001 to 1 March 2004) which is statute barred under art. 44 of the Sarawak Limitation Ordinance which provides a three years limitation for claims for interests. Hence the BN is bad in law.

G [3] On this point, Mr Wong relies solely on the judgment in *Re Lim Szu Ang, Ex P Kewangan Utama Bhd* [2005] 7 CLJ 23 where the learned judge held as follows:

H Commencement of a bankruptcy proceeding is not an enforcement of a judgment or order. A bankruptcy proceeding is a proceeding that would eventually result in the issuing of adjudicating and receiving order whereby the judgment debtor is required to account for his assets and liabilities to an official receiver or official assignee (now known as the Director General of Insolvency) as the case may be, for the purpose of satisfying all its creditors including the judgment creditor who has petition for the bankruptcy.

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Thus the bankruptcy proceeding is an action on a judgment but not an enforcement of the judgment within the meaning of O. 45 r. 1(1) Rules of the High Court 1980.

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Article 44 of the Schedule to the Sarawak Ordinance provides that a claim for money payable for interest upon money due from the defendant to the plaintiff must be made not later than three years from the date the interest becomes due. In this case, the period of three years for a claim on the interest on the judgment sum in the consent order runs from 9 October 1995, the date of consent order, and expired on 8 October 1998. Here, the bankruptcy notice was issued on 9 May 2000, about one year and seven months after the expiry of the limitation period under Art. 44 of the Sarawak Ordinance. Likewise, the creditor's petition was presented on 17 November 2000, two years and one month after the expiry of the limitation period under the same article. Thus, applying the Federal Court decision in Ernest Cheong, the bankruptcy notice was issued out of time under art. 44 of the Sarawak Ordinance and was therefore invalid.

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[4] Mr. Tony Ling in responding to Mr. Wong's submission referred the court to the decision of the Court of Appeal in *Chin Sin Lan v. Delta Finance Bhd* [2004] 3 CLJ 113 where it held that the Sarawak Limitation Ordinance does not apply to bankruptcy proceedings. This is what Gopal Sri Ram JCA said:

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Before dealing with the question as to which is the relevant item, it is in our judgment imperative to address our mind to the definition of "suit" in the Ordinance. It is defined as follows:

'suit' include any action or other proceeding. Now, these words were considered by the Straits Settlements Court of Appeal in *Neo Ong Tew v. Neo Ong Hee* [1926] 1 SSLR 120. Section 2 of the Straits Settlements Limitation Ordinance No. 56 defined in terms identical the word "suit" to the Sarawak Ordinance. Deane J when interpreting "suit" said:

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a proceeding by way of execution of a judgment is therefore a suit, and will fall to be dismissed if instituted after the period of limitation prescribed by the schedule.

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We are persuaded by the view of the Straits Settlements Court of Appeal in *Neo Ong Tew's* case. Accordingly, in our judgment, item 97 and 98 to the Schedule of the Sarawak Ordinance which refer to suits, include execution proceedings. In other words, an execution proceeding upon a judgment in the State of Sarawak is caught by the limitation period prescribed by the appropriate item. We use the expression "appropriate item" advisedly because we find it unnecessary in the present appeal to identify the precise item which applies in the present instance. In our view, the important question is whether bankruptcy proceedings are execution proceedings within the

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- A Ordinance, ie, within the definition of “suit”. In addressing the question, we bear in mind the caveat imposed upon us by Lord Scarman in *Kong Min Bank v. Sim Siok Eng* [1982] 1 LNS 12:
- B The Limitation Ordinance of Sarawak, which is similar to other limitation enactments in Malaysia, is based not on the English Statute but on the Indian legislation, the structure of which it follows closely. Argument by analogy from the English law may result, therefore, in error, whereas the Indian and Malaysian case law is a useful guide to the interpretation of the Ordinance.
- C Returning to the question posed, we are of the view that bankruptcy proceedings are not execution proceedings and do not therefore come within the definition of “suit” as defined by the Sarawak Limitation Ordinance. In arriving at this conclusion, we agree with and find support for our view, from the judgment of Edgar Joseph Jr J in *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Berhad* [1990] 1 CLJ 176; [1990] 3 CLJ (Rep) 349. His Lordship there said:
- D Before I embark upon a consideration of the UK decisions, I would make the preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment.
- E Since the Bankruptcy Act 1967 and the Rules thereunder apply throughout Malaysia, the expression bankruptcy proceedings must have the same and uniform meaning in the states of West Malaysia as well as the states of Sabah and Sarawak. If they do not include execution proceeding in the states of West Malaysia they cannot include execution proceeding in Sabah and Sarawak. In our judgment, therefore, the Limitation Ordinance of Sarawak has no application to
- F the facts of the present appeal.
- Since the respondent has already obtained leave, and as we have earlier observed, is entitled to commence bankruptcy proceedings, and the Sarawak Limitation Ordinance not applying to the appellant’s case, we reject the argument by learned counsel on the limitation point.
- G [5] Having considered the respective submissions and with respect, I agree with Mr. Ling as he had correctly pointed out that the decisions which the learned judge relied on in *Lim Szu Ang, Ex. P. Kewangan Utama Bhd (supra)* concerned the Limitation Act which only applied to West Malaysia. The decision in *Chin Sin Lan v. Delta Finance Bhd*
- H relates directly to the issue raised in this appeal, that is the applicability of the Sarawak Limitation Ordinance to bankruptcy proceedings. Under such circumstance, I am bound by and must follow that decision.
- I [6] Mr. Wong also raised another ground which attacks the judgment upon which the BN was based on. He complained that the manner in which the judgment was framed meant that the 1st and 2nd defendants were jointly liable and only to take action against the 2nd defendant is

improper. With respect I find no merit in this complaint. The debtor knew very well that she was sued as a guarantor and her liability is independent to that of the principal borrower (1st defendant) and in such circumstance the law is crystal clear and that is the judgment creditor can seek payment of the judgment debt from whomever it chose to do so.

[7] Even if there is any ambiguity in the judgment recourse to the statement of claim can be made to clear up whatever ambiguity.

[8] Accordingly, this appeal is dismissed with costs.

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